

*In the Matter of Auditor 1, Taxation (PS3295U),
Department of the Treasury and the
Communications Workers of America, Local 1033*
DOP Docket No. 2002-826
(Merit System Board, decided October 6, 2004)

The Communications Workers of America, Local 1033 (Local 1033), represented by Walter R. Bliss, Jr., Esq., challenges the use of Performance Assessment Reviews (PAR's) as a factor in the scoring criteria for the promotional examination for Auditor 1, Taxation (PS3295U), Department of the Treasury.

By way of background, on September 1, 2000, the Department of Personnel (DOP) issued an announcement for the above-noted title and Department. The announcement, which had a closing date of September 21, 2000, produced a list of 67 eligibles after the examination was held on April 28, 2001. On June 27, 2001, DOP promulgated an eligibility roster for the subject title containing the names of the 67 eligibles. Moreover, the eligibility roster was certified for disposition on five occasions (Certification #'s PS010951, PS010952, PS010953 and PS010966, issued on July 5, 2001, and Certification #PS023014, issued on November 27, 2002). A total of 41 appointments were made and 26 eligibles were not appointed.

Local 1033 argues that the system of including PAR ratings in the calculation of the final scores on promotional examinations is discriminatory. In this regard, it notes that the method of giving a candidate three points for a rating of "exceptional" and one point for a rating of "satisfactory" results in giving candidates, whose final averages are fairly clustered, more difficulty in obtaining promotions. Local 1033 also notes that it is involved in federal court litigation with the DOP and the Merit System Board concerning discrimination on the basis of race and ethnicity under the PAR system. It also contends that the arbitrary use of PAR's to adjust promotional eligibility rankings is compounded by the fact that the affected candidates have different supervisors and, thus, the ratings they receive on their PAR's may be the result of subjective standards that unfairly prejudice some candidates in a PAR's-weighted promotional process. Moreover, exacerbating this problem is the fact that the candidates for the Auditor 1, Taxation title come from different employment backgrounds. Thus, the candidate population included Auditor 2's who have been employed in this capacity for quite some time and others who only completed their working test period before the closing date. For the latter group, the most recent PAR's on file are for their work as Auditor 3's, whose PAR ratings are not comparable to those of long standing Auditor 2's because, in Local 1033's view, they are based on a different job.

In response to these arguments, Mary Ann Pauline, a Hispanic eligible on the subject list, submitted a letter indicating that, in her estimation, the scoring of the test was appropriate and that she worked very hard to obtain her rating. She notes that PAR's are

based on how you are performing your job, *not* on what title you are doing it in. In short, she believes that the use of PAR's was fair and that the test should be allowed to stand.

In reply, Local 1033 points out that Ms. Pauline's position exemplifies how the PAR system as applied pits one employee against another. Local 1033 points out that the real question is whether PAR ratings are subject to arbitrary variations among employees of equal ability who also work equally hard. Thus, even if one supervisor were able to apply PAR criteria fairly, there is no guarantee that multiple supervisors will do the same with their respective employees. PAR ratings, Local 1033 contends, can be used to manipulate test results or to limit their significance. In support of its contention that the PAR rating system results in differential treatment of employees by race, national origin and gender, Local 1033 provides a copy of an empirical study written by Dr. Kenneth R. Peres, Research Director for CWA District One, dated February 2, 1999 and entitled "A Clear & Present Danger – Racial & Ethnic Bias in the State's Performance Rating System." The major thesis of this report, prepared in response to the State's application of PAR ratings to determine layoff rights, is that the implementation of the PAR system has created an "adverse impact" on minorities, defined as an "instance where the percentage of minorities who received a specific rating is less than 80% of the percentage of whites with the same rating."

Local 1033 petitions the Board to develop a uniform State policy regarding the use of PAR ratings for promotional purposes and that the eligibility roster for Auditor 1, Taxation be re-issued without the use of the PAR ratings.

N.J.A.C. 4A:4-2.15(c)1i-ii provides that candidates for State service promotional examinations shall receive credit for the final PAR rating on file in the candidate's personnel office as of the announced closing date for the rating period immediately preceding the announced closing date on the basis of three points for exceptional and one point for commendable.

CONCLUSION

The issue presented in the present matter is whether the PAR ratings in question had an adverse impact on the candidates for the subject Auditor 1, Taxation promotional examination. For the reasons that follow, the Board finds no evidence of an adverse impact on this candidate pool.

Initially, it should be noted that effective October 1, 2003, the Communications Workers of America and the State of New Jersey agreed to implement a revised performance evaluation system (PES). Under PES, a two-tier rating system of satisfactory and unsatisfactory replaced the prior system. Moreover, employees receiving a satisfactory and unsatisfactory evaluation will be accorded one and zero points,

respectively. As with the prior rating system, PES ratings will remain a factor in the scoring of promotional examinations.

A review of the present record establishes that the distribution of PAR ratings among the minority and white candidate pool on the subject examination and the subsequent disposition of the list of eligibles do not reflect any evidence of an adverse impact. DOP records demonstrate that 88 individuals applied for and were admitted this examination. Out of these applicants, 67 passed the examination, 18 failed it, and 3 were no shows. The distribution of PAR ratings also appears to be even-handed and fair among the minority and white candidate population. The candidate pool was divided among 55 whites and 12 minorities. The minorities were composed of 8 African-Americans, 3 Asian-Americans, and 1 Hispanic. The breakdown of PAR ratings among whites and minorities was as follows:

- 1) 25 whites received a PAR rating of three;
- 2) 29 whites received a PAR rating of one;
- 3) One white received a PAR rating of zero;
- 4) Three African-Americans received a PAR rating of three;
- 5) Four African-Americans received a PAR rating of one;
- 6) One African-American received a PAR rating of zero;
- 7) One Hispanic (the only Hispanic in the candidate pool) received a PAR rating of three;
- 8) One Asian-American received a PAR rating of three; and
- 9) Two Asian-Americans received a PAR rating of one.

With respect to the minorities, five out of the twelve minority candidates received PAR ratings of three, or exceptional. In other words, 42% of the minority pool received a PAR rating of three. Among the white candidate pool, 25 out of 55 white candidates were conferred a PAR rating of 3, or 45% of the white candidates. The difference in the percentage of minorities and the percentage of whites who received the higher rating is, statistically, very small and not sufficient to establish an indicia of discriminatory or adverse impact in this particular situation.

Moreover, as noted above, a total of 41 appointments were made to date from the subject eligibility roster, and of the 26 remaining eligibles, 25 were white and one was African-American (who received a PAR rating of one). Under these circumstances, the Board does not find any evidence that either the PAR ratings were distributed in a discriminatory manner or that the ratings had an adverse impact on the minority candidates.

In short, the Board finds no basis in the present record to grant the relief requested by Local 1033. Accordingly, it has failed to meet its burden of proof in this matter.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.